No. 14,648

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CIVIL AERONAUTICS BOARD,

Appellant,

vs.

FRIEDKIN AERONAUTICS, INC., d/b/a PACIFIC SOUTHWEST AIRLINES,

Appellee.

Brief for Appellee Friedkin Aeronautics, Inc., d/b/a Pacific Southwest Airlines.

LEWIS T. GARDINER,
MESERVE, MUMPER & HUGHES,
612 South Flower Street,
Los Angeles 17, California,
Attorneys for Appellee, Friedkin Aeronautics, Inc., d.b.a. Pacific Southwest Airlines.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES PAGE

PAGE

MISCELLANEOUS

STATUTES

PAGE

No. 14,648

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CIVIL AERONAUTICS BOARD,

Appellant,

vs.

FRIEDKIN AERONAUTICS, INC., d/b/a PACIFIC SOUTHWEST AIRLINES,

Appellee.

Brief for Appellee Friedkin Aeronautics, Inc., d/b/a Pacific Southwest Airlines.

Statement of the Case.

A. The Pleadings.

The instant proceeding is an appeal by the Civil Aeronautics Board from the dismissal of a complaint filed by said Board [R. 3] wherein both temporary and permanent injunctions were sought to restrain Pacific Southwest Airlines from transporting passengers within the state of California whenever such transportation follows or is preceded by a journey by the same passenger between a point in this state and a point outside this state. As a basis for such claimed relief the Board places reliance upon the provisions of the Civil Aeronautics Act of 1938, as amended; its case is necessarily predicated upon the

specific and detailed definitions of air transportation set forth in subparagraph (21) of Section 1 of that Act (49 U. S. C. A. 401).[1] The pertinent provisions of this Section are contained in an appendix to appellant's brief and in the appendix to the within brief.

The answer of appellee Friedkin Aeronautics, Inc., doing business as Pacific Southwest Airlines, [R. 8] admitted that it had, since 1949, been engaged as a common carrier between various cities in California and that it did not possess a certificate of public convenience and necessity authorizing it to engage in interstate air transportation. It alleged compliance with the safety requirements of the Act and possession of a certificate issued by the Civil Aeronautics Authority to operate and "to conduct common carrier operations carrying passengers intrastate on a scheduled basis" in accordance with the provisions of the Civil Aeronautics Act of 1938, as amended. The answer set up the affirmative defense that the complaint failed to state a claim against the defendant upon which relief could be granted [R. 10].

B. The Evidence.

The evidence presented in support of appellant's cause of action consisted of the reports of appellant's investigators resulting from their contacts with clerical personnel of various ticket agencies and of non-scheduled air carriers, many of whom had ceased operations at the time of the hearing before the District Court [R. 74-75]. This evidence appellant regarded as tending to show that

---

[1]Reference to this statute and to the Civil Aeronautics Board will sometimes hereinafter be made as the "Act" and the "Board", respectively.

in some instances such ticket agencies would sell passengers a ticket upon appellee's line for transportation within California and a ticket upon another air line flying between California and an eastern city. There is no evidence or allegation that the company carries United States mail or that any of its planes depart the state of California as a part of such air transportation. The substance of the Board's evidence is that, as a result of the activities of such ticket agencies or because occasionally an incoming interstate carrier did not have sufficient traffic to warrant continuing its own flight, passengers were sometimes transported upon planes of Pacific Southwest Airlines following or preceding passage to or from a point in another state.

The opinion of the District Judge, filed on September 17, 1954, and reproduced in the record in the instant proceeding at pages 77-85, succinctly sets forth the fundamental issue before both the trial court and this court. The statement of the case contained in the appellant's brief, however, embellishes the court's opinion in certain respects which, although not unduly significant, nevertheless require rectification at this point. The assertion that any passengers moving to or from out-of-state points who might have used appellee's intrastate facilities did so as a result of any "arrangements" between appellee and any interstate or other carriers is without support in the opinion of the District Judge or the pleadings. Similarly, the assertion that this type of traffic existed with the knowledge of appellee that such passengers were engaged in interstate travel is a somewhat distorted version of the record. Upon this point and upon the equally unsupported point that a "substantial" number of passengers engaging in interstate travel were carried by appellee, a review of

the record and a reading of the opinion of the trial court will furnish considerable elucidation. Appellee will consider these matters at a later point in this brief.

C. The Issue.

The issue upon this appeal then, is not whether Congress possesses the power to authorize the Civil Aeronautics Board to assert economic regulatory control over intrastate air commerce, but whether, by the enactment of the Civil Aeronautics Act and the incorporation therein of detailed and definitive descriptions of the jurisdiction of the Board, it did in fact authorize that agency to attempt to prohibit an intrastate air carrier from incidentally transporting, as a very small portion of its total traffic, passengers who had theretofore or who did thereafter embark upon an interstate journey via another carrier.

Summary of Appellee's Argument.

The fundamental contention of appellee in the court below and the basis of the decision therein is that the applicable provisions of the Act in the light of available authorities shows that, although federal authority in the field of air safety is supreme and all-encompassing, a more restricted grant of jurisdiction exists in the licensing or economic field. Comparison of the statutory language defining "interstate air transportation" with other definitions in the Act and with the provisions of other legislation in the field of interstate commerce indicates the obvious intention of Congress to circumscribe the Board's authority with respect to economic regulatory control over air carriers as distinguished from federal authority in the fields of safety and aircraft operation.

The foregoing interpretation of the Act is not that of appellee alone. Although judicial precedents are not plentiful, the cases wherein it has been necessary to place a construction upon these definitions show concurrence in the views expressed herein. Such recognized authorities as Mr. Oswald Ryan, a member of the Civil Aeronautics Board for seventeen years, and the late Senator McCarran, the author of the Act, have repeatedly conceded the lack of federal economic regulatory jurisdiction under the present statutory provisions. Contemporaneous and subsequent legislative expressions have similarly indicated that the amendment of these definitions is a prerequisite to the type of control which the Board seeks herein by judicial interpretation. Finally, the administrative construction of the Civil Aeronautics Act by the Board and the pronouncements of other federal courts have in several instances contained expressions of opinion contrary to the position of the Board herein.

The decisions of the federal courts in similar types of cases arising under federal statutes containing jurisdictional provisions far broader than that here involved are indicative of the principle that, even under those statutes, activities of the type here under consideration are not to be regarded as the type of activity over which Congress has seen fit to assert authority. In fact, in a number of administrative proceedings under certain other federal enactments, and in some cases under the Civil Aeronautics Act itself, the operations of each appellee in the within proceedings have come under the scrutiny of such agencies and in each instance the decision has been that the operations here in question have not been such as to warrant the exercise of federal control.

A review of the record herein will disclose that an extended investigation by the Board, in which appellee cooperated fully, has failed to disclose any more than an inconsiderable number of instances wherein passengers journeying from a place in one state to a place in another state had made use of appellee's facilities. Although Pacific Southwest Airlines is a modest operation in comparison with some of the trunkline air carriers in the United States, its volume of commuter-type traffic is indeed large when contrasted with the alleged number of "interstate" passengers which appellant attributes to it. Such passengers as may have utilized appellee's facilities in this manner are shown by the record to have done so as a disconnected portion of their interstate trip. Ticketing procedures, baggage handling and all aspects of appellee's operations are seen to be apart from and unrelated to those of any other carriers. The record further shows that asserted arrangements with other carriers are in truth and fact nothing more than the simultaneous sale of tickets upon the lines of such carriers and appellee by independent ticket agencies; the volume of this type of traffic is seen to be virtually *de minimus* in contrast with the total business of either the appellee, the non-scheduled airlines or the air transportation industry. To give consideration to the same in the face of appellee's obligations as a common carrier would be to ignore both legal and equitable considerations bearing upon the instant controversy.

ARGUMENT.

I.

The Definition of "Interstate Air Transportation" in the Civil Aeronautics Act of 1938, as Amended, Does Not Include the Intrastate Carriage of Passengers by a Common Carrier Which Does Not Cross a State Line While Engaged in Such Carriage.

A. Interpretation and Analysis of the Definition of Interstate Air Transportation.

As indicated above, the text of Section 1(21) of the Civil Aeronautics Act of 1938 (49 U. S. C. A. 401) is set forth in the appendix to both the appellant's and the within brief. Simplified by the elimination of references to the District of Columbia and the Territories and Possessions, over which Congress has plenary jurisdiction, interstate air transportation of passengers is seen to mean the carriage by aircraft of persons as a common carrier for compensation or hire in commerce between a place in one state and a place in any other state. In reading the complete subparagraph and not just a selected phrase therefrom, it is seen that this is a far different and far more specific statute than one covering parties who are engaged in "interstate commerce" or "the production of goods for commerce" or in activities which "affect interstate commerce" or statutes which refer to restraints of or burdens upon interstate commerce. Because of this narrow definition contained in the Civil Aeronautics Act, decisions under these other statutes are of little avail to appellant. On the other hand, decisions holding that comparable activities do not

constitute interstate commerce under such broader definitions, *a fortiori* support appellee's position under the more restricted law.

From the outset, the United States Supreme Court has declared that commerce among the several states does not cover that which is completely internal or which is carried on between different parts of the same state. From the time of *Gibbons v. Ogden* and the case of *The Daniel Ball,* innumerable decisions have recognized, however, that as to matters of *safety and inspection,* in some instances Congress could lawfully apply certain standards of conduct to those engaged in *intrastate* commerce where such is necessary to the protection of *interstate* commerce. The Civil Aeronautics Act follows this pattern. Those portions of the legislation relating to the operational or navigational aspects of aircraft apply by their terms to any aircraft or to any pilot "which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce," regardless of the local nature of the flight. (Secs. 1(3); 601 *et seq.*) Whether or not Congress could have similarly exerted its authority under the commerce clause with respect to the economic regulation of intrastate commerce need not here concern us. Under the present Act, Congress has not exercised any such power.

Mr. Oswald Ryan, an original member of the Civil Aeronautics Board and, until very recently still a member of such Board, has analyzed the pertinent provisions of the Act in an article in 31 Virginia Law Review 479. At page 482 he points out:

> "The new federal act provided regulation for air transportation both in the economic and in the safety fields. But while it limited the economic control to interstate, overseas and foreign air transportation

(and all transportation of air mail), its safety provisions covered not only interstate, overseas and foreign air commerce but also 'the navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects or which may endanger safety in interstate, overseas or foreign air commerce.' The jurisdiction imposed with respect to air safety was broader, therefore, than that imposed upon the economics of air transportation since it embraced all air transportation that traverses the vast system of federal airways; all air navigation which directly affects or may endanger safety upon those airways; all air transportation that carries air mail; the great volume of nonscheduled air commerce of an interstate character which operates outside the federal airways, and also all air navigation that directly affects or may endanger the safety of this 'off-the-airways' interstate navigation."

Again, at page 497, Mr. Ryan shows how the statutory language under which economic controls are imposed is more restricted than the definition of "air commerce" under which safety regulation is affected:

"The Civil Aeronautics Act of 1938 regulates 'air commerce' and 'air transportation.' Air transportation is defined to mean 'interstate, overseas or foreign air transportation or the transportation of mail by aircraft' and its use is, generally speaking, confined to those provisions which deal with economic regulation. The term 'air commerce' is defined to mean 'interstate, overseas or foreign air commerce or the transportation of mail by aircraft *or any operation or navigation by aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in interstate, overseas or foreign air commerce.*' (Emphasis

supplied.) It will be noted that the definition of 'air commerce' has a much broader application than 'air transportation.' Its use is limited, however, to the safety regulatory provisions of the Act. The power thus conferred upon the Civil Aeronautics Board to regulate any operations or navigation of aircraft which affects or endangers safety in interstate air commerce has been exercised by the Board through regulation imposing a requirement for a federal license on all aircraft and all airmen, without distinction between those engaged in interstate or intrastate commerce, or in commercial or non-commercial flying, and whether on or off the civil airways."

Mr. Ryan's article discusses the Uniform State Air Carrier Bill and also refers to the subject of state laws covering economic regulatory measures over air carriers. Appellee contends that the very existence of these state measures is corroborative of the fact that Congress has not usurped the field of intrastate air carriage, as is the fact that Congress has considered and rejected numerous amendments to the 1938 Act which would extend Federal economic control to intrastate air carriers.[2] In discussing the appropriate scope for state economic regulation Board member Ryan suggests that an intrastate operation paralleling and competing with an interstate operation is a type of service which a state might certificate. At page 520 he describes the following hypothetical but analogous situation:

"If, for example, a state operator should fly between San Francisco and Los Angeles or between El Paso and Texarkana, or between New York and Buffalo, the resulting diversion of traffic from the

---

[2]See, *infra*, under the heading "Legislative History."

> interstate operator would undoubtedly supply the constitutional basis for the exercise of federal control. It is clear, however, that Congress thus far has not exerted its power to impose any such economic control over intrastate air operations."

For a more recent analysis of the Act with a corresponding conclusion, see 7 Cal. Jur. 2d, Aviation, Sec. 12, at page 463, the following appears:

> "The federal jurisdiction asserted by the Civil Aeronautics Act with respect to economic regulation of civil aviation is not as extensive as in the field of safety in two important respects—it extends only to common carriage by air, *and only to those actually engaging* in interstate, overseas, or foreign commerce. It does not in terms extend to anyone who by his activities only affects, or places a burden upon, interstate or foreign commerce in the air. This more limited authority in the economic field results from the fact that Congress provided for economic jurisdiction only over 'air transportation,' which, as defined in the act, means (1) transportation of the United States mail, or (2) the carriage of persons or property as a common carrier for compensation in interstate, overseas, or foreign commerce, whether such commerce moves only by aircraft, or partly by aircraft and partly by other forms of transportation." (Emphasis added.)

The exercise of state and federal authority with respect to the economic regulation of intrastate flights of air carriers has resulted in recent judicial scrutiny of the Civil Aeronautics Act with respect to this point. In *People v. Western Airlines, Inc.,* 42 Cal. 2d 621, 268 P. 2d 723 (1954), penalties imposed by the California Public Utilities Commission were upheld against the defendant

carrier for increasing fares charged for intrastate transportation without approval of that commission.[3] In rejecting the defense that any regulation of an interstate air carrier by states is barred by the Civil Aeronautics Act, the court considered the extent to which Congress has asserted its jurisdiction over civil aviation. After pointing out that this depends upon the terms of the legislation which has been adopted, the California Supreme Court stated, at page 644:

> "Sections 601-610, 49 U. S. C. A. §§55-560, state the jurisdiction asserted over safety factors of air carrier regulation; sections 401-416, 49 U. S. C. A. §§481-496, over economic factors. Rates and tariffs are controlled by the latter sections. *Under those provisions and the definitions contained in section 1, 49 U. S. C. A. §401, it seems clear that Congress has not sought to extend the economic regulation of the board to intrastate transportation of persons or property other than mail;* nor has it attempted to oust the states of control over such rates."
>
> * * * * * * * * *
>
> "There is no language indicating that Congress intended to pre-empt the field of economic regulatory control of air transportation so as to include the transportation of passengers solely between points within a state and not involving the use of the airspace outside of the state. We are not concerned on this appeal with the question whether Congress could

---

[3]In a companion case, *People v. California Central Airlines*, 42 Cal. 2d 877, 268 P. 2d 744 (1954), the court said: "Any difference in factual background in that this company is not federally certificated, that it operates entirely intrastate and that it did not petition for review of the commission's decision and order of April 24, 1951, does not affect the result."

properly assert such power. There appear to have been no decisions of the United States Supreme Court defining the limits of such regulatory control.

"Attention has been called to numerous recommendations and bills presented to Congress, prior to and since the enactment of the Civil Aeronautics Act of 1938 seeking to extend federal economic regulation to include intrastate operations of air carriers, and also to the fact that none of these has been enacted into law. This would seem to strengthen the conclusion that Congress has not assumed control over carriers to the exclusion of state control as to their intrastate rates."[4] (Emphasis added.)

Another decision of the United States District Court, Southern District of California, has recently described one of the appellees herein as not being engaged in interstate air transportation within the meaning of the Act. *In the Matters of Airline Transport Carriers, Inc., and California Central Airlines, Inc.* (Feb. 28, 1955), 2 C.C.H. Aviation Law Reporter, Par. 17,618. As stated by Hall, D. J.:

"Clearly California Central Airlines was not an 'air carrier' as defined by Section 401 of Title 49, since it was not engaged in 'air transportation' involving 'interstate, overseas or foreign air commerce or the transportation of mail by aircraft.' It did none of those things, and the terms of the Civil Aeronautics Act do not apply to it, and hence, not to the sale of its assets by the trustees."

---

[4]The Attorney General of Utah has also expressed the opinion that the Public Service Commission of the State of Utah has exclusive jurisdiction of any intrastate air service which is a public utility. (2 C. C. H. Aviation Law Reporter 23,179.)

Appellant has cited *Civil Aeronautics Board v. Canadian Colonial Airways,* 41 Fed. Supp. 1006 (1940). Examination of the opinion in that case will disclose that not only was the carrier resisting the imposition of economic regulatory control, but it was protesting the right of the Civil Aeronautics Authority to require adherence to the safety regulations. As hereinbefore stated, there is no question that the Civil Aeronautics Act constitutes a full expression of the Congressional power over commerce in this regard. (See App. Br. p. 8, fn. 3.) The cited decision merely constituted a ruling upon a discovery procedure and granted the Board the right to ascertain the names and addresses of the carrier's passengers.

The conclusion of the California court that new legislation would be required in order that the Board might possess authority over the intrastate operations of air carriers has recently been recognized by an official committee charged with the duty of exploring, among other things, this very subject.[5] Furthermore, in the Annual

---

[5]At the request of President Eisenhower, in the fall of 1953, the Air Coordinating Committee, acting for and on behalf of the federal government, undertook a comprehensive review of federal aviation policies. The Chairman and Co-chairman of this Committee were, respectively, Robert B. Murray, Jr., Undersecretary of Commerce for Transportation, and Chan Gurney, Chairman, Civil Aeronautics Board, and the report of the Committee, "Civil Air Policy", dated May 1, 1954, contains a chapter headed "Federal-State-Local Regulations". Under a subheading, "Economic Regulations", the following discussion appears at page 45:

> "The Civil Aeronautics Board has authority under the Civil Aeronautics Act of 1938, as amended, to regulate passenger and property rates charged by air carriers for interstate transportation by air. The Board does not have, however, direct power to fix such rates for carriage performed over intrastate segments by interstate carriers. Nor does the Board have

Report of the Civil Aeronautics Board for the year 1954[6] under the heading "Legislation", the Board's recommendations for new legislation include the following:

> "8. To authorize the Board to exercise rate control over intrastate segments of interstate air carrier routes."

It is submitted that the clear-cut and unequivocal construction of this legislation by recognized authorities in the field of aviation legislation and the thorough analysis[7] of the statute in *People v. Western Airlines, supra,* furnish compelling reasons for concluding that the definition of "interstate air transportation" in the Act does not include the intrastate carriage of passengers by a common carrier which does not cross a state line while engaged in such carriage.

B. Administrative Construction of the Civil Aeronautics Act.

Appellant asserts that the construction and administrative interpretation of the Act by the Civil Aero-

---

express power to fix passenger and property rates charged by an intrastate carrier engaged in carrying the mails.

"Fares and rates charged on such intrastate routes may have a direct effect on the subsidy needs of the carrier involved; in certain instances such rates could also result in a burden on interstate commerce. We believe that Federal funds should not be utilized to finance intrastate commerce by air and that interstate commerce should bear no more than its proportionate share of the combined costs of intrastate and interstate operations. *We believe that additional legislation to vest power in the Board to control this situation is desirable.*" (Emphasis added.)

[6]U. S. Government Printing Office (1955), p. 38.

[7]Five pages of the court's opinion are devoted to an analysis of the interstate-intrastate conflict.

nautics Board is entitled to great weight as being that of the agency charged with administering the statute. Among others, the case of *Canadian Colonial Investigation,* 2 C.A.B. 752 (1941) is discussed. It is submitted, however, that the language of the Board in that case which immediately follows the portion quoted by appellant is more in accord with appellee's contention that Congress has not yet extended economic regulation of the instant subject to the Civil Aeronautics Board. This passage reads as follows:

> "It may be that if such a situation as has arisen here had been foreseen Congress would have given 'air transportation' a broader definition. There are obvious reasons for bringing within the scope of economic regulation all operations of aircraft for hire through the airspace of the United States. We are not, however, concerned with what the law might have been, but what it is."

More recently, in the case of *Allegheny Airlines, Inc. and Southwest Airways Company,* C.A.B. Docket Nos. 7030, 7039, 2 C.C.H. Aviation Law Reporter, Par. 21,822 (April 20, 1955), the Board's opinion refers to one of the appellees in the instant proceeding in the following language:

> "The benefits to the public interest in the instant transaction far outweigh the detriments. It must be borne in mind that California Central conducted *intrastate* operations within California, and thus that the effect upon *interstate air transportation,* as defined

by the Civil Aeronautics Act, caused by the elimination of the bankrupts' service is negligible."[8]

In the instant proceeding it was recognized in the court below that the routes, schedules, passenger loads and methods of operation of the two appellees are in virtually all respects quite comparable. They are and have been competitors since each commenced operations in early 1949. The case of *Allegheny Air Lines, Inc. and Southwest Airways Co., supra,* involved a proceeding to determine whether Board approval would be necessary for the sale to those companies of the transport planes utilized by California Central Airlines. When the Board concluded, as the quotation above indicates that it did, that the consequent elimination of the services of California Central Airlines would have a *negligible effect* upon interstate air transportation, was not the Board arriving at an administrative determination which should at least be persuasive in resolving the present controversy? And the conclusion necessarily follows that the effect upon interstate commerce of the operations of this appellee is similarly negligible.

---

[8]In this case the Board also makes reference to Pacific Southwest Airlines as an *intrastate* carrier (*ibid.*, fn. 16), which is consistent with the position of the Civil Aeronautics Authority in issuing this appellee a commercial operator's certificate wherein, after stating that the company has met the requirements of the safety standards prescribed under the Civil Aeronautics Act of 1938, the certificate provides that appellee is "authorized to operate as a commercial operator and to conduct common carrier operations carrying passengers intrastate on a scheduled basis" [R. 52, 70].

As observed by the court below, the fact that the Board has made virtually no effort toward the exercise of economic regulatory control over intrastate carriers is of some significance.[9] Appellee submits that the true basis for such self-imposed restraint is in the lack of statutory authorization; it will next be seen that the legislative treatment of the Act since its passage would appear to corroborate this absence of jurisdiction in the Board under the present law.

C. Legislative History of the Provisions of the Act Relating to Economic Regulatory Control by the Board.

Appellant places reliance upon the assertion that some three years before the passage of the Civil Aeronautics

---

[9]See the language of Mr. Justice Frankfurter in Federal Trade Commission v. Bunte Brothers, Inc. (1941), 312 U. S. 349, at page 351:

> "That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred. See Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, 315, 77 L. ed. 796, 807, 53 S. Ct. 350. This practical construction of the Act by those entrusted with its administration is reinforced by the Commission's unsuccessful attempt in 1935 to secure from Congress an express grant of authority over transactions 'affecting' commerce in addition to its control of practices in commerce. S. Rep. No. 46, 74th Cong., 1st Sess. These circumstances are all the more significant in that during the whole of the Commission's life the so-called Shreveport doctrine operated in the regulatory field committed to the Interstate Commerce Commission. And it is that doctrine which gives the contention of the Trade Commission its strongest support."

Act the Congress had been considering some type of legislation in this field and that another government agency then expressed some hesitancy over the inclusion of a provision exempting operations solely within a state from the coverage of such bill. But the mere fact that congress did not adopt a bill expressly declining jurisdiction over intrastate air transportation does not thereby call for the conclusion that the Act thereby covers intrastate commerce. The court in *People v. Western Airlines, Inc., supra,* answered this argument at page 645:

> "It is true, as defendant points out, that Congress did not use language in the Civil Aeronautics Act of 1938 such as that employed in different legislation asserting its control over other kinds of common carriers in which it was expressly stated that such regulations shall not be construed to interfere with the exclusive exercise by each state of the power to regulate intrastate commerce. (See §1 (2) Interstate Commerce Act (49 U. S. C., §1) (railroads); §202 (b) Part II, Interstate Commerce Act (49 U. S. C. §302) (motor carriers); §303 (j) Part III, Interstate Commerce Act, (49 U. S. C. 903) (water carriers).) The failure to use such language in the Civil Aeronautics Act does not necessarily imply that federal regulation of air transportation was intended to exclude all state control."

Acts of Congress apply only to the extent to which Congress asserts its authority—plenary jurisdiction does not attach to a subject because Congress fails to exempt it.

Rather than considering provisions rejected by Congress some years earlier, it would appear more fruitful to reflect upon the fact that in the drafting of the language prescribing the Board's jurisdiction, the Congress in 1938

had before it the considerable volume of legislation passed during the years 1934 through 1937 which, for the most part, was predicated upon the power of Congress to regulate commerce among the several states. By 1938 the United States Supreme Court had also had occasion to consider the constitutionality of most of these acts and had invariably upheld the same. The constitutional coverage of the legislation enacted during this period greatly exceeded previous enactments based upon the commerce power[10] and the Supreme Court in sustaining the same found it necessary to overrule precedents of long standing. Considered in this light, then, the question must be asked as to why Congress, in adopting language setting forth the Board's economic regulatory powers, did not avail itself of this then quite apparent legislative aggrandizement and provide that the Board should be allowed to regulate or certificate any carriers, the activities of which "affected commerce" or which possessed some other indirect relationship to interstate commerce. The Congress did adopt language of this type in defining "interstate air commerce" upon which federal authority over air safety is bottomed. The fact that a distinction was drawn between "air commerce" and "air transportation" seems particularly significant in view of the then recent broadening of the

---

[10]See the dissenting opinion of Mr. Justice McReynolds in National Labor Relations Board v. Fainblatt, 306 U. S. 601 at 614, 83 L. Ed. 1014 at 1022 (1939), where he refers to "the tremendous enlargement of federal power . . ." and to ". . . the change of direction, no longer capable of concealment, . . ."

frontier of constitutional law in the field of interstate commerce.[11]

Furthermore, Congress upon numerous occasions has considered bills which would have amended the Act so as to provide for more complete economic regulatory control in the Civil Aeronautics Board. These bills, to which reference is made by footnote,[12] have been presented at rather regular intervals both prior to and during the seventeen years in which the Act has been in effect. In 1953 Senate Bill 2647 was introduced by Senator McCarran, the author of the 1938 Act and the recognized Congressional leader in this field of legislation. Comprehensive and extended hearings were held by the Senate Committee on Interstate and Foreign Commerce during April, May, June and July of that year. At pages 114-115 of the

---

[11]"When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly." Frankfurter, J., in *Federal Trade Commission v. Bunte Brothers, Inc.* (1941), 312 U. S. 349, at 351.

[12]Report of the Federal Aviation Commission, Sen. Doc. No. 15, 74th Cong., 1st Sess. (Jan. 30, 1935), 237-239;

78th Congress: Lea-Bailey Aviation Bill introduced as H. R. 1012 abd. S. 246; revised form of Lea-Bailey Aviation Bill, H. R. 3420; Boren Bill, H. R. 4845; Reece Bill, H. R. 4848.

79th Congress: Lea Bill, H. R. 674; Johnson Bill, S. 541; Lea Bill, H. R. 3383; S. 1.

80th Congress: Wolverton Bill, H. R. 2337.

81st Congress: Brewster Bill, S. 423; Johnson Bill, S. 445; Johnson Bill, S. 2435.

83rd Congress: McCarran Bill, S. 3647.

84th Congress: Bricker Bill, S. 308; S. 1119.

report of this hearing[13] Senator McCarran referred to a proposed revision in the definitions of interstate air commerce and interstate air transportation. With respect to the latter, he advised the Committee:

> "What I have just said with regard to the definition of 'interstate air commerce' applies with equal force to the definition of 'interstate air transportation,' at the top of page 22.
>
> "In connection with both of these definitions, question has been raised as to what is meant by the language in clause (B), 'interstate commerce between places in the same State.' In the fear that the explanation I have already given on this point may have been too technical, let me say that the effect of including this particular language is to broaden Federal jurisdiction so as to include operations in interstate commerce, even though between places in the same State; while at the same time preserving the rights of the States with respect to operations which are wholly intrastate commerce as distinguished from interstate commerce."

No action was taken by the Congress upon S. 2647 and similar legislation was again introduced in the 84th Congress, 1st session.[14] As we have seen, the President's Air Coordinating Committee and the Civil Aeronautics Board itself have gone on record to the effect that "additional legislation to vest power in the Board" over intrastate segments of interstate transportation by air is needed.[15]

---

[13]Hearings before the Committee on Interstate and Foreign Commerce, United States Senate, Eighty-Third Congress, 2nd Session, on S. 2647. U. S. Gov't Printing Office (1954).

[14]S. 308; S. 1119; H. R. 4648; H. R. 4677.

[15]*Supra,* fns. 5 and 6.

II.

Judicial and Administrative Decisions Construing Other Federal Legislation Enacted Pursuant to the Power of Congress Over Commerce Among the Several States Support Appellee's Contention That Its Activities Are Not Covered by the Economic Regulatory Authority of the Civil Aeronautics Board.

In reading the decisions in the field of interstate transportation, one is repeatedly told that "the question whether commerce is interstate or intrastate must be determined by the essential character of the commerce." Like many other cryptic generalities, these words contain no real solution, and it is necessary to seek guidance from the decisions in the light of the particular statute and the facts involved. In determining the extent and applicability of the federal power over interstate commerce, the courts have contributed a legion of decisions, sometimes conflicting in language and result. Appellant, presumably because of the dearth of decisions construing the Civil Aeronautics Act upon the point in question, has referred to various decisions under the Sherman Anti-Trust Act, the Interstate Commerce Act, the Motor Carrier Act, the Fair Labor Standards Act, and other federal enactments. Most of the statutes under which such authorities have arisen contain definitions which assert virtually the full power of Congress over interstate commerce. Many of such laws by definition apply to conduct which merely "affects" or "burdens" commerce. Most of the cases are concerned with the shipment of goods in commerce or with interstate traffic, whereas the Civil Aeronautics Act prescribes regulatory measures directed to the carrier.

Bearing these distinctions in mind, it is nevertheless desired to devote sufficient attention to the decisions in other fields to bring out the fact that the cases cited by appellant are not necessarily representative and to demonstrate further that, even under statutory enactments containing broad and comprehensive jurisdictional grants of authority, factual situations comparable to that here under consideration have been declared to be beyond the pale of the laws in question. Indeed, with respect to two such statutes, the administrative agencies charged with enforcement thereof have declared that the activities and operations of this appellee, Pacific Southwest Airlines, during the same period as is here involved, have not been such as to warrant the assertion of jurisdiction by such agencies. These rulings, together with other administrative and judicial decisions, will now be reviewed.

A. The Railway Labor Act.

Title II, Section 201 (45 U. S. C. A. 181) of this statute provides for coverage of "every common carrier by air engaged in interstate or foreign commerce * * *." The National Mediation Board is the agency authorized to hold representation hearings and to otherwise conduct investigations of the coverage of air carriers as well as rail carriers under the act. In November, 1953, such a hearing was held at San Diego, California, with respect to Pacific Southwest Airlines. A record of such hearing was thereafter transmitted by the hearing officer to said board, the sole issue of jurisdiction was extensively briefed by the parties and on March 18, 1954, in File No. C-2200, a decision of dismissal was entered. (2 C.C.H. Aviation Law Reporter, Par. 23,183 (1954). The order and accompanying opinion of the National Mediation Board are

set forth in the record herein, at pages 65-71. The concluding paragraph reads as follows:

> "On the basis of the entire record in this case, the Board finds that Friedkin Aeronautics, Inc., doing business as Pacific Southwest Airlines, is not a carrier within the meaning of Title II, Section 201 of the Railway Labor Act, as amended. The National Mediation Board has no jurisdiction over this carrier, and the application of the Air Line Pilots Association, International, to investigate a representation dispute pursuant to Section 2, Ninth, of the Railway Labor Act among Airline Pilots employees of that carrier, is hereby dismissed."

B. The National Labor Relations Act.

This legislation (29 U. S. C. A. 151 *et seq.*), first enacted in 1935, applies to employers engaged in "commerce" and to labor disputes "affecting commerce," the latter term being defined therein as meaning "in commerce, or burdening or obstructing commerce or the free flow of commerce, * * * " (Section 2 (7)).

Appellee, Pacific Southwest Airlines, has been subjected to an investigation as to the jurisdiction of the National Labor Relations Board under this statute. On July 30, 1954 in Cases No. 21 C. A. 1963, 1964, 1968, 1969, 1972 and 1973, proceedings of this type were dismissed by the Acting Regional Director at Los Angeles, California. The following language appears in the dismissal letter:

> "As a result of the investigation, it does not appear there is sufficient evidence that the Company is engaged in commerce within the meaning of the Act to warrant further proceedings at this time. I am, therefore, refusing to issue complaint in this matter."

Such action was consistent with the decisions of the National Labor Relations Board in comparable cases:

Chicago Motor Coach Co., 62 N.L.R.B. 890;

Williams, d.b.a. Checker Cab Co., 110 N.L.R.B. No. 109;

Cambridge Taxi Co., 101 N.L.R.B. 1328;

Airways Transportation Co., 107 N.L.R.B. 181;

See, also, *New York State Labor Relations Board v. Charman Service Corp.,* 126 N. Y. L. J. 85. (1951), 20 C.C.H. Labor Cases, Par. 66,452; aff'd without opinion (N. Y. App. Div.) 3-4-53.

C. The Sherman Anti-Trust Act.

This well known act (15 U. S. C. A. 1) applies to contracts, combinations or conspiracies "in restraint of trade or commerce among the several States" (Sec. 1). Appellant has cited *United States v. Yellow Cab Co.,* 332 U. S. 218, 91 L. Ed. 2010 (1947), which decision contains examples of transportation related to interstate commerce, part of which was held to come within the coverage of the Sherman Act and part of which did not. First, the Parmelee Transportation Co., which, under contract with the carriers and not the passengers, transports only interstate passenger traffic from one railroad station to another railroad station in Chicago, Illinois, as a necessary part of that interstate passenger's journey from one state to another. Parmelee carries no local traffic. Second, the principal taxicab operating companies in Chicago, who engage in the transportation of interstate and local travelers to and from Chicago railroad stations. Even under

the broad statutory coverage of the Sherman Act, the court held that, although the Parmelee service falls within the coverage of that act, the activities of the Yellow Cab Company and the Checker Cab Company do not constitute interstate commerce. The court stated at page 230:

> "We hold, however, that such transportation is too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act. These taxicabs, in transporting passengers and their luggage to and from Chicago railroad stations, admittedly cross no state lines; by ordinance, their service is confined to transportation 'between any two points within the corporate limits of the city.' None of them serves only railroad passengers, all of them being required to serve 'every person' within the limits of Chicago. They have no contractual or other arrangement within the interstate railroads. Nor are their fares paid or collected as part of the railroad fares. In short, their relationship to interstate transit is only casual and incidental."

This case is the basis of the decision in *Airline Transport, Inc. v. Tobin,* 198 F. 2d 249 (1952), cited by appellant. The court held drivers of airport limousines at Durham, North Carolina, to be "engaged in commerce" within the meaning of the Fair Labor Standards Act. The employer corporation, by contract with three interstate airlines, agreed that its limousines would be for the exclusive use of passengers, freight, newspapers and airline personnel and property. Many aspects of its business were controlled by the contract, including schedules and the availability of the limousines for special trips. The court reviewed these facts in the light of the decision

in *United States v. Yellow Cab Co., supra,* and declared that the employer's activities more closely resembled those of the Parmelee company than the cab operations.[16]

D. Interstate Commerce Act.

More than fifty years of judicial interpretation of this statute have resulted in a considerable accumulation of decisions under varying factual situations. Most of the cases concern freight, rather than passengers. The decisions discussing the effect of an interruption in shipment for the most part involve stoppages upon the line of one carrier only; those in which there is an absence of any direct relationship between two separate carriers, as here, are less plentiful. Appellee urges that the examples herein set forth are factually analogous to the case at bar.

In *New York Central R. Co. v. Mahoney,* 252 U. S. 152, 64 L. Ed. 502 (1920), the plaintiff below was on a trip from Toledo, Ohio, to Pittsburgh, Pa., via Cleveland, Ohio. He travelled on a pass from Toledo to Cleveland, paid a fare to appellant carrier from Cleveland to Youngstown and intended to use a pass upon the original

---

[16]*Cf.* the language of Justice Brewer in *N. Y. ex rel. Pennsylvania Railroad Company v. Knight,* 192 U. S. 21, 48 L. Ed. 325 (1903):

> "As we have seen, the cab service is rendered wholly within the state, and has no contractual or necessary relation to interstate transportation. It is either preliminary or subsequent thereto. It is independently contracted for, and not necessarily connected therewith. But when service is wholly within a state, it is presumably subject to state control. The burden is on him who asserts that, though actually within, it is legally outside the state; and unless the interstate character is established, locality determines the question of jurisdiction."

carrier from Youngstown to Pittsburgh. When the plaintiff was injured between Toledo and Cleveland, the court held that the law applicable to the case was Ohio law in that the portion of the trip upon which plaintiff was injured was intrastate. The basis of the decision was stated by the court as follows:

> "The contract which the defendant had with its passenger was in writing and was for an intrastate journey, and it cannot be modified by the purpose of Mahoney to continue his journey into another state, under a contract of carriage with another carrier, for which he would have been obliged to pay the published rate, or by an intended second contract with the defendant in terms which are not disclosed. The mental purpose of one of the parties to a written contract cannot change its terms."

To the same effect is *White v. St. Louis Southwestern R. Co. of Texas,* 86 S. W. 962 (Tex. Civ. App., 1905).

In *Gulf, Colorado & Santa Fe Railway Company v. Texas,* 204 U. S. 403, 51 L. Ed. 540 (1907), a shipment of corn which originated in South Dakota was transferred by the original carrier to the plaintiff carrier at Texarkana, Texas. The plaintiff carried the shipment to Goldthwaite, Texas. The question arose whether the portion of the trip between Texarkana and Goldthwaite was an interstate shipment and hence not subject to the regulations of the State Railroad Commission. In holding that the second carriage was an intrastate shipment, the court stated:

> "In many cases it would work the grossest injustice to a carrier if it could not rely on the contract of

> shipment it has made, know whether it was bound to obey the state or Federal law, or, obeying the former, find itself mulcted in penalties for not obeying the law of the other jurisdiction, simply because the shipper intended a transportation beyond that specified in the contract."

To the same effect is *Balesville Southwestern R. Co. v. Mims,* 111 Miss. 574, 71 So. 827 (1916).

In *Kurtz v. Pennsylvania Company,* 16 I. C. C. 410 (1909), complainant owned a mileage book good for a trip between Pittsburgh and New York. He bought a local ticket at New Castle, Pennsylvania, good to Pittsburgh, and presented the two to the Pullman Company. The company rejected complainant's proffered tickets and insisted upon receiving the interstate rate from New Castle to New York. The Commission held that the trip from New Castle to Pittsburgh was separate and distinct from the remainder of the trip, saying, ". . . not the intent of the parties but the actual transaction must be regarded. . . ."

E. Motor Carrier Act.

The case of *United States v. Capital Transit Co.,* 325 U. S. 357, 89 L. Ed. 1663 (1949), relied upon by appellant, arose under this act. The ground of the decision, however, was not the interstate character of the journey of the passengers; it was expressly predicated upon carrying out the national transportation policy declared in that

act. With respect to the interstate commerce point, the court declared at 325 U. S. 361:

> "We need not consider whether they came within the second exception because of our conclusion that the Commissioner's findings justified its order under the first exception."

Under the Motor Carrier Act, moreover, there have been administrative decisions which are much closer upon the facts to the instant proceeding.

In the case of *Red Star Lines,* 3 M. C. C. 313 (1937), the bus route traversed was located entirely within the state of Maryland. A permit had been issued by the state covering travel between Elktown and Chestertown. The Elktown terminus was at the Pennsylvania Railroad Station. However, the carrier issued tickets only to points en route, not beyond it; it did not interchange express and carried no mail. The Interstate Commerce Commission said that the only possible fact giving a color of interstate commerce was the station connection and the showing of timetables connecting with New York and Philadelphia trains. But there were no through tickets and no evidence of any common arrangement between applicant and the railroad for interchange of passengers. Accordingly, the Commission found the bus company not engaged in interstate commerce and that the operation was not subject to the Motor Carrier Act of 1935.

Accord: *Virginia Stage Lines,* 15 M. C. C. 519 (1938).

III.

Appellee Is Indisputably an Intrastate Airline. The Use of Appellee's Facilities by Passengers Engaged in Interstate Journeys Has Been Inconsiderable and Incidental to Its Intrastate Activities.

A. The Operations of Appellee, Pacific Southwest Airlines.

Appellee, Friedkin Aeronautics, Inc., doing business as Pacific Southwest Airlines, is a California corporation organized in 1949 [R. 9, 72]. Since May of that year it has operated from one to four Douglas DC-3 high-density-seating passenger planes as a scheduled intrastate air carrier between cities in the state of California. The general offices, operations office, maintenance and repair base and other general facilities are at Lindbergh Field, San Diego, California. All of the directors are residents of the San Diego area and all of the stock of the corporation is owned by residents of that area. The company has never had any contracts to carry mail for the United States Government, nor does it carry freight or cargo of any type [R. 56].

The company's operations are limited to service between the cities of San Diego, Burbank and San Francisco.[17] A field office with ticket agents, a dispatcher and field personnel are based at each of these stops. The company being, as stated, a scheduled carrier, is to be distinguished from the irregular or non-scheduled air carriers which operate transcontinentally. Similarly, the company in no way resembles the feeder-type carriers which in various

---

[17]Until approximately March, 1954, the company also served Long Beach and Oakland, California.

parts of the country, including California, serve numerous small towns, transporting many passengers with scheduled connecting flights on the trunk line carriers, all as part of a single passage. The vast majority of appellee's passengers, on the other hand, are local commuter-type customers.[18] The tickets utilized by appellee and the fact that there are no transfer privileges between it and any other carrier clearly illustrate the local nature of the operations. [R. 55.] No sales of Pacific Southwest Airlines tickets are made outside of the state and it does not sell tickets on flights of other carriers [R. 55]. Its tickets are valid only to the destination printed thereon, and the coupon type tickets of both the scheduled trunk line carriers and the irregular non-scheduled carriers are not accepted by, or received in exchange for, flights upon Pacific Southwest Airlines [R. 55, 60].

The company's tariff structure is filed with the Public Utilities Commission of the State of California [R. 50, 52]; prior to the filing of the complaint herein the company had never been subjected to the economic regulations of the Civil Aeronautics Board [R. 50]. Various aspects of its flight operations relating to safety, equipment maintenance and pilot proficiency are subject to the Safety Regulations of the Civil Aeronautics Administration, as are the flight activities of every air line, commercial operator, private pilot or student pilot in this country.[19] In this connection it is interesting to note that the Certificate furnished the company by the Air Carrier Safety Branch

---

[18]During 1953-54 the company carried approximately 10,000 passengers per month [R. 57].

[19]Both of the appellees herein have safety records free from fatalities.

of the Civil Aeronautics Authority authorizes the appellee to operate as "a commercial operator and to conduct common carrier operations carrying passengers intrastate on a scheduled basis" [R. 52, 70].

For appellee, or any carrier, to attempt to ascertain whether, and when, boarding passengers had previously arrived in California from an out of state point would constitute an inexorable burden. This is even more true with respect to the plans, if any, of its passengers with respect to future interstate flights. And for a carrier to reject a prospective passenger for this reason would, of course, be a violation of its duties as a common carrier.

B. Neither the Facts Alleged in the Complaint nor the Evidence in the Record Constitute a Violation of the Civil Aeronautics Act or Otherwise Entitle Appellant to Relief.

Appellee has heretofore expressed its disagreement with certain aspects of appellant's recapitulation of the facts presented by the record. While it is recognized that the issue herein is entirely a question of law it is appropriate that the legal issue be resolved in the light of the evidence presented at the hearing.

It is a matter of public record and the Court is no doubt familiar with the fact that the vast majority of interstate and foreign flights of scheduled air carriers in California arrive and depart from Los Angeles International Airport and San Francisco International Airport. A few of such flights touch at San Diego, and fewer still, at Burbank. Pacific Southwest Airlines does not serve Los Angeles International Airport. It is understandable, therefore, that appellant's evidence in its entirety related to asserted "connections" at Burbank and Oakland with the

planes of miscellaneous *non-scheduled* irregular air carriers. (The evidence relating to the asserted operations of appellee at Oakland was outmoded prior to the filing of the complaint as the company has not served that station since March, 1954.) No showing was made that Pacific Southwest Airlines flights coincide in any way with the varying arrival and departure times of these non-scheduled air carriers, nor does the record show the volume of such traffic as contrasted with that of scheduled air carriers; the record does indicate that the number of irregular carriers has constantly diminished [R. 74-75].

The basis of appellant's case appears to be predicated upon the activities of various independent ticket agencies, rather than upon the acts of the appellee carrier. The tickets accepted for passage on Pacific Southwest Airlines are sold only at the regularly established ticket offices operated by the company within the state of California and by traditional travel agencies, who also sell tickets upon various other forms of transportation [R. 55]. The fact that certain ticket agents may, upon occasion, make a reservation for a passenger upon appellee's line and also upon another line is a natural and understandable marketing procedure of such agencies. Similarly, for an intrastate carrier to "block off" or reserve a number of seats for a travel agent by no means constitutes an "arrangement" or agreement between the intrastate carrier and the interstate carrier which the customers of the travel agent may utilize for their interstate transportation. This alleged "interstate commerce by association" is a far cry from the showing necessary to bring a carrier within the coverage of the federal statute. Moreover, an occasional extension of consideration to passengers who may be delayed in arriving at the airport does not constitute such passen-

gers "connecting passengers" or otherwise change the basic nature of the operations of the intrastate carrier. Finally, the record indicates that wherever possible the interstate carriers themselves transport their continuing passengers to their ultimate California destination and it is only when the number of such passengers exceeds the capacity of the interstate carrier, or is insufficient to warrant the continuation of the flight, that the ticket agency makes other arrangements for the onward transportation of any such passengers [R. 248-249]. Very occasionally, the record indicates, the number of such passengers has been "substantial" in comparison with the capacity of appellee's airplanes (31 seats); the trial court did not declare that there was a substantial portion of the total business of either appellee of this type. As indicated heretofore, Pacific Southwest Airlines averages approximately 10,000 passengers per month; the number of persons shown to be utilizing its facilities as a portion of an interstate journey was *de minimus*.

Therefore, the most that can be said in support of appellant's contentions upon these points is that out of the several score of regularly scheduled flights conducted each week by this appellee, all within the territorial limits of the state of California, some of such flights might carry individuals who have previously completed or are then contemplating a subsequent interstate trip upon another, but not a "connecting", carrier. Similar analysis would show that in some instances certain of the appellee's flight crew might vicariously acquire knowledge of those passengers who are engaged in such interstate peregrinations. In other instances the company would have no way of knowing. Appellee is engaged in the business of running a scheduled air line between certain California cities, however, and it

is not only sound business but a legal obligation that it shall accept, without discrimination, all passengers seeking transportation, whether such persons buy their tickets individually or through a travel agency. As a common carrier licensed by the Public Utility Commission of the State of California, appellee is duty-bound, whenever space is available, to carry any persons desiring to undertake a journey upon its planes and who duly tender the stated fare.[20] The record shows, moreover, that appellee has studiously refrained from participating in any type of ticket interchange, transfer procedure or other arrangement with other carriers.

The operations of Pacific Southwest Airlines being restricted to the territorial limits of the state of California, are not within the purview of economic regulatory control by the Civil Aeronautics Board.

Conclusion.

The jurisdiction of the Civil Aeronautics Board under the Civil Aeronautics Act of 1938, as amended, does not authorize that agency to require an intrastate airline to hold a certificate of convenience and necessity under the Act as a condition of transporting passengers by air when such airline does not engage in flights beyond the state. This conclusion is compelled by an analysis of the statute itself and by judicial and administrative construction thereof. It is further substantiated by the legis-

---

[20]California Constitution, Art. XII, Sec. 17; California Public Utilities Code, Sec. 556; California Central Airlines, *et al.*, Dec. 45624, Calif. Pub. Utilities Comm. (1951), 2 C.C.H. Aviation Law Reporter, Par. 23,132; writ of review denied by California Supreme Court, without opinion; dismissed *per curiam* for want of substantial federal question, U.S.S.C. (1-7-52).

lative history of the Act and judicial precedent in related fields.

For the foregoing reasons the judgment of the District Court herein should be affirmed.

July, 1955.

Respectfully submitted,

LEWIS T. GARDINER,

MESERVE, MUMPER & HUGHES,

Attorneys for Appellee, Friedkin Aeronautics, Inc., d.b.a. Pacific Southwest Airlines.

APPENDIX.

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended, are as follows:

Definitions.

Sec. 1 (49 U. S. C. 401). As used in this Act, unless the context otherwise requires—

(3) "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

(20) "Interstate air commerce," "overseas air commerce," and "foreign air commerce," respectively, mean the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the air space over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(21) "Interstate air transportation," "overseas air transportation," and "foreign air transportation," respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the air space over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any state of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.